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FOR THE NINTH CIRCUIT

JAMES A. MURRAY, DOING BUSINESS UNDER THE NAME AND STYLE OF THE POCATELLO WATER COMPANY,
APPELLANT,
VS.
THE CITY OF POCATELLO, A MUNICIPAL CORPORATION, APPELLEE.

APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

D. WORTH CLARK,
JESSE R. S. BUDGE,
W. H. WITTY,
Attorneys for Appellee,
Pocatello, Idaho.

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STATEMENT.

This suit was brought for the cancellation of a franchise granted to the defendant James A. Murray upon June 6, 1901, relating to the furnishing of water for the use of the City of Pocatello and its inhabitants, as appears from its Ordinance No. 86, a copy of this ordinance being attached to the amended bill of complaint. (Tr., folios 12 to 20, pages 14 to 22). At the time Ordinance No. 86 was passed the defendant James A. Murray owned and was operatiny a water system by which the City of Pocatello was supplied with water under a former ordinance Numbered 59 (passed June 8, 1898), which

was in favor of the Pocatello Water Company, a corporation, said Ordinance No. 59 confirming and continuing in it as assignee certain rights and privileges theretofore conferred upon the defendant, and his then associates, F. D. Toms and John J. Cusick, by Ordinance No. 46 passed January 4, 1892. Copies of these ordinances are attached to the answer to the amended bill herein, Ordinance No. 46, being found between folios 42 and 46, and Ordinance No. 59 between folios 46 and 51 of the transcript, both of said ordinances included in transcript pages 49 to 58. In the amended bill the city alleged that Murray had not performed the conditions subsequent contained in said ordinance which were the consideration for the granting of the same, and that in addition to that fact it is alleged that he had not furnished under the provisions of any of said ordinances an adequate supply of water for the use of the city of Pocatello and its inhabitants, and had failed to extend street mains and adopted many other oppressive policies. The source of the water supply is three small mountain streams known as Mink, Gibson Jack and Cusick Creeks. The flow of Mink Creek during the dry season above the intake of the Mink Creek pipe line in each year being conceded to be something in excess of three cubic feet per second; of Gibson Jack Creek about two cubic feet, and Cusick Creek is a negligible quantity in the dry season. The water from Mink Creek is conveyed by a pipe line about six miles in length and which has a theoretical capacity of approximately seventy-five hundredths of a second foot, and an actual capacity of between forty-six hundredths and fifty-six hundredths of a second foot (folios 117 and 143 of the transcript). This pipe line

discharges a portion of the waters of Mink Creek into Gibson Jack Creek. From that point the waters of Mink Creek and Gibson Jack Creek are united and carried through a single pipe line to the upper reservoir situated on the bench above and near to the city of Pocatello. (Folio 143 Tr.) It is, therefore, only such water as can be conveyed through the pipe from Gibson Jack Creek to the reservoir aided by such an amount as may be found in Cusick Creek at certain times of the year that reaches the city through this water system, and there are times during the dry season when Cusick Creek runs dry, and it, therefore, cannot be depended upon as a permanent supply. (Folio 239, Tr.)

At the time of the passage of Ordinance No. 86, no water was being used from Mink Creek except such water as could be conveyed through a wooden flume, which was replaced by the pipe line in question shortly after Ordinance No. 86 was passed. The defendant's water system is the only one furnishing water for sale, rental or distribution to the city of Pocatello or its inhabitants, and the water is used by the municipality for street sprinkling and for protection against fire and by the inhabitants for domestic and manufacturing purposes and during the summer season for their lawns, trees and gardens. The population of the city is upwards of 10,000 inhabitants, this population being approximately twice as much as the population of the city at the time Ordinance No. 86 was passed. As given by the Mayor at the time Ordinance No. 86 was passed the population of Pocatello was about 5000, the 1910 census shows 9,100, and there has been considerable increase since that time. In the year 1905 and after the passage

of Ordinance 86 and after the construction of the pipe line from Mink Creek to Gibson Jack Creek, the water situation became acute (testimony W. H. Cleare, folios 144-145), and since that time it appears that practically every year water troubles developed. In the year 1911 all the reservoirs ran dry, and the city was without fire protection and the management of the plant was temporarily taken out of the hands of the Superintendent (folios 193 to 195, Tr., and other testimony as appears in transcript). Ordinance No. 59 reaffirmed the grant of Ordinance No. 46, established a schedule of water rates and required the water company to substitute a steel pipe for the wooden flume by which the waters of Gibson Jack and Mink Creeks were carried to the reservoir. Ordinance No. 46 grants to defendant Murray and his associates a franchise to lay pipes in the streets and to supply water to the city of Pocatello and its inhabitants for a period of fifty years and three conditions were imposed, as follows:

First: Murray and his associates were to complete the plant and be ready to deliver water within the period specified.

Second: The water supply was *to be conveyed from the creeks on Fort Hall Indian Reservation known as Mink and Gibson Jack creeks* and was to be *sufficient to supply both the public and private use and purpose of citizens and inhabitants of the town of Pocatello,* and was to *be of pure and healthful quality.*

Third: The water was to be conveyed to and confined in a suitable and substantial reservoir or reservoirs at

a point above the town so as to furnish a pressure of 150 pounds.

The immediate laying of certain prescribed mains and laterals for the distribution of water is provided for in the following language:

> *"Thereafter main pipes and laterals may be laid as the occasion or consumption demands."*

Then Ordinance No. 86 was passed and the conditions therein to be performed by the water company are described in the preamble, which reads as follows:

> *"Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink Creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money."*

Then Section 6 provides as follows:

> "Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void."

Section 8 provides:

"If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any source, directly or indirectly, without reference to the provision of this ordinance. Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements contemplated by this ordinance, or such further improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply."

ARGUMENT.

Points and Authorities.

That an equity court will in a proper case declare forfeited and cancelled a franchise of this character is so well settled that it is unnecessary to discuss the law further than to cite the authorities so holding. The following cases appear to be in point:

City of Columbus vs. Mercantile Trust Co., 218 U. S., 645.

Farmers Loan & Trust Co. vs. Galesburg, 133 U. S., 156.

City of St. Cloud vs. Water, Light & Power Co., 92 N. W., 1112.

Capital City Water Co. vs. State, 18 So., 62.

Grand Haven vs. Water Works, 57 N. W., 1077.

Water Co. vs. Jackson, 19 So., 774.

Palestine Water Co. vs. City of Palestine, 40 L. R. A., 203.

Ennis Water Works vs. City of Ennis, 136 S. W., 512.

"Where doubts arise as to the intent of the parties such doubts must be resolved in favor of the public."

Stein vs. Beinville Water Supply Co., 141 U. S., 647.

Construction of Provisions of Ordinance No. 86.

Under the provisions of Ordinance No. 86 the agreement by the defendant to "make all extensions of street mains warranted by the growth of the city" is in effect the same as the provisions of Ordinance No. 46, which provides for the furnishing to the city of Pocatello, and its inhabitants of a "*sufficiency of pure and healthful water,*" and in such a way as to "convey water to the citizens and inhabitants of the town of Pocatello within one year from and after the passage and approval of the ordinance." The said Ordinance No. 46 also provided that certain mains ond laterals were to be immediately constructed and other mains and laterals not immediately necessary were not to be laid in advance of the actual need thereof. Therefore, when analyzed, it will appear that only one obligation was imposed upon Murray by the provisions of Ordinance No. 86 and that was "*to bring in the waters of Mink Creek.*" Ordinance No. 46 had in it (folio 43, Tr.), the following provision:

> "That said water so used, shall be conveyed from the creeks on the Fort Hall Indian Reservation, known as Mink and Gibson Jack Creeks, and shall be in quantity sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello, and shall be of pure and healthful quality."

Therefore, if the city received anything at all for the numerous burdens imposed upon it by Ordinance No. 86, it was such benefit as they received when there was placed in Ordinance No. 86 the agreement of the defendant "*to bring in the waters of Mink Creek*" and if that only meant what the defendant contends that it meant, that is, such an amount of the waters of Mink Creek as he might think sufficient, then certainly there can be no contention but that this matter was fully covered by the provisions of Ordinance No. 46, because in Ordinance No. 46 was the statement:

> "That said waters so used, shall be conveyed from the creeks on the Fort Hall Indian Reservation known as Mink and Gibson Jack Creeks and shall be in quantity sufficient to supply both the public and private purposes of the citizens and inhabitants of the town of Pocatello," etc.

And if the contention of appellant is correct, the city received absolutely no consideration for the burdensome conditions imposed upon it by the provisions of Ordinance No. 86. We think the fair construction is that by Ordinance No. 86 the city and Murray agreed as to what was a necessary amount of water, that is *the water of Mink Creek.* In other words, that it was an agreement that the city would consider *the waters of Mink Creek* adequate and that Murray would bring those waters to the city. It is admitted that the defendant has not brought in any considerable portion of the waters of Mink Creek during low water season, or during any of the seasons of the year, the fact being that during the low water season there is always upwards of three second feet flowing in Mink Creek at the intake of the defend-

ant's pipe line and that the actual amount of water diverted is approximately one-half of a second foot. We can say what we have to say in closing the argument upon this phase of the matter no better than by using the words of the learned District Judge, and, therefore, we adopt as a part of our argument the portion of the opinion which reads as follows:

> "If, therefore, the city received any consideration at all for the onerous terms of Ordinance 86, it consisted solely and exclusively of such new obligation, if any, as was imposed upon the defendant by his agreement "to bring in the waters of Mink Creek;" and whether this clause does or does not create a new obligation depends upon whether we adopt the construction contended for by the city or that urged by the defendant. By the city it is said the defendant thus agreed to bring in all the waters of Mink Creek, and by the defendant, only such portion thereof as might be reasonably necessary from time to time to supply the public needs. In any view that may be taken of the issue of fact touching the shortage of water, relative to which the evidence is conflicting, what, under this clause of the ordinance and upon the undisputed facts, is the defendant's position? Admittedly the pipe line from Mink Creek is of a capacity little, if any, more than sufficient to carry one-fourth of the flow of Mink Creek, even in the low water season, and therefore if his agreement was to bring in all the waters of the stream he has in a vital matter substantially failed to perform. If, upon the other hand, in accordance with his contention, it be held that by this provision he was required to bring in only such water as was reasonably necessary, then the ordinance must be held to be ineffective and non-enforceable, for in that view it is wholly without any consideration whatsoever, a mere

nudum pactum. Before it was passed, the defendant, by virtue of Ordinance 46, stood expressly obligated to furnish water 'sufficient to supply both the public and private use and purpose' of the city and its inhabitants, and to convey the same from Mink Creek, as well as Gibson Jack. Such a construction would therefore be fatal to the entire defense, for under it the ordinance becomes a nullity, and ineffective either to confer any right upon the defendant or in any respect to bind the plaintiff.

But it is thought that such a view of the meaning of the stipulation cannot be maintained. It is not to be presumed that either the city authorities or the defendant intended to perpetrate a fraud upon the public. It is conceded upon behalf of the defendant that the language of the ordinance is susceptible to the construction urged by the city. Indeed, it can hardly be controverted that such is the natural import of the language; the defendant agreed, not 'to bring in water from Mink Creek,' but to 'bring in the waters of Mink Creek.' The stream is a small one, and it may be readily conceived that both parties were of the opinion that the entire flow was required to supply needs which, if not wholly instant, were so near at hand that immediate provision should be made therefor. The phraseology is wholly inappropriate to convey the limited meaning for which the defendant contends; nor is the language in any other part of the instrument favorable to such a construction. There is no intimation that the necessary conduit was to be added to or increased from time to time as there might be need. Not only were the 'waters of Mink Creek' to be brought in, but the construction of the pipe line by which this result was to be accomplished was to be commenced within ninety days after the approval of the ordinance and carried 'to effective and speedy comple-

tion without unnecessary delays, interruptions or discontinuances.' Such language leaves no room for the theory that pipe lines were to be constructed in installments at such intervals as the defendant might deem to be proper. Force is added to this view by the present strenuous contention of the defendant that the waters of Gibson Jack and Cusick Creeks not only were, at the time of the passage of the ordinance, but still are, more than sufficient to supply all of the plaintiff's needs. If that be the case, and if we adopt the defendant's theory of the meaning of the ordinance, it necessarily follows that the waters of Mink Creek never have been needed, and that therefore defendant never has been under any present obligation to construct a pipe line, either large or small, and that he may at his option, without violating any of the rights of the plaintiff, tear up the line which he did build. It is reasonable to infer that one of the purposes of the ordinance was to put at rest the question of the sufficiency of the supply, and to forestall and prevent just such a controversy as has here arisen, by definitely providing that the waters of Mink Creek, which were admittedly sufficient for such needs as then existed or were likely to arise in the immediate future, should be made available and put at the service of the city. Moreover, in the light of experience, and of facts in the record, and of what other municipalities have been doing, such was the course dictated by prudence and reasonable foresight. It appears that the sources from which a gravity supply for the plaintiff can be procured are limited, and of these the streams hereinbefore named are the most desirable. Under the system of water appropriation which prevails in this State, rights of private individuals might be initiated and become vested in the waters of Mink Creek at any time. The city's present and future

interests therefore demanded that any claim which the defendant at that time had the right to make or to initiate, to the waters of Mink Creek, should be perfected and protected by the construction of the requisite means for the diversion and application of the water to a beneficial use. It was competent for the city to contract for such protection, and its desire so to do, it is reasonable to presume, was one of the moving considerations for submitting to the conditions imposed upon it by the ordinance. The contention that it would have been against public policy for the defendant to have appropriated more of the public waters than was necessary to supply the immediate needs of the city, and that therefore the construction of a larger conduit would have been a vain thing, is without merit. Under the law of the State an appropriator has a reasonable time to apply the water which he has appropriated, to a beneficial use, and if such rule may be invoked in the case of an appropriation for agricultural purposes it should, and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality. Besides, if not required for the immediate necessities of the city, the appropriation could have been consummated and the right held intact by a temporary application of any surplus to other beneficial uses. Upon this branch of the case the conclusion is unavoidable that the defendant's failure to bring in and make available for the uses of the plaintiff the waters of Mink Creek constitutes a substantial breach of his contract."

Aside from the situation as disclosed by the evidence and prior ordinances, it would seem that the terms of the ordinance speak for themselves.

Other Reasons For Cancelling Franchise Alleged in Bill of Complaint.

While it is true that in paragraph 9 of the bill of complaint (folios 3 and 4, Tr.), the charge is made that defendant has failed to live up to his contract by bringing in the waters of Mink Creek as he agreed to do, yet there are other charges made, and in paragraph 10 (folios 4 and 5, Tr.), the following charges are made:

(a) That the water supply is insufficient.

(b) That Murray has promulgated unreasonable rules.

(c) That at various times of the year the people of Pocatello have not had sufficient water to sprinkle the streets of the city, and for culinary and domestic uses and for fire purposes.

(d) That particularly during the summer of 1911 the reservoirs became dry.

In paragraph 11 (folio 6, Tr.), it is charged that defendant has placed reducers in the service pipes of the users of water from the system, and has thereby caused the water users great annoyance and inconvenience. In paragraph 13, it is charged that the manager of this company is pursuing a policy of ill-will and malice towards the inhabitants of the city.

Insufficiency of Water Supply.

During the summer of 1911 the total flow of Gibson Jack and Cusick Creeks supplemented by the water brought in from Mink Creek, amounted to 2.56 second

feet. The testimony of W. P. Havenor in this regard (folio 143, Tr.), is as follows:

> "On August 21, 1911, I measured the amount of water flowing in Mink Creek, above the intake of the company, and found 3.2 second feet.
>
> On August 22, 1911, I measured the water being discharged from the Mink Creek pipe line into the flume above the Gibson Jack intake and found .46 of a second foot.
>
> This pipe line is the only means of conveying water into the water system of the company. On August 22, 1911, I measured the water flowing in Gibson Jack Creek and determined the quantity to be 1.63 second feet. On the 7th of September, 1911, I measured the water flowing in Cusick Creek and found .13 of a second foot. All these measurements were taken above the intakes of the company's pipe lines. On Gibson Jack Creek it was taken 183 feet above the intake. There was no water coming into the creek between the point of measurement and the intake in any case."

W. E. Moore testified (folio 111, Tr.), as follows:

> "I found 3.16 cubic second feet there (Mink Creek) going to waste. I measured the water in the flume at Gibson Jack Creek and carried from Mink Creek, and it was .46 of a second foot. I have figured the capacity of the pipe line leading from Mink Creek to Gibson Jack at .71 of a second foot. This is the maximum amount this pipe would carry. I would say that my measurement of .46 second feet carried in the pipe was correct within 10 per cent. I think the pipe was that day carrying close to its capacity under conditions surrounding it at that time. I made measurements again on September 14, 1911,

and found running in the pipe from Mink Creek to Gibson Jack .56 second feet. This was correct within one per cent. The day before I was at Mink Creek and found 3.57 of a second foot running."

William A. Ashton testified (folio 117, Tr.), as follows:

"I am fifty-three years of age; live at Salt Lake City, and am a civil engineer. Have been engaged in engineering for thirty years and have had occasion several times to measure water. Was at one time chief engineer for the Oregon Short Line and am now chief engineer for the Utah Railroad Company. On September 15th, with other parties, I measured the water flowing in Mink Creek above the intake of the Pocatello Water Company's pipe. One measurement showed 3.5 second feet, another 3.7 second feet. Practically all the water at that time was passing by the intake and down the stream. There might have been a little diverted into the pipe. We couldn't get right to the pipe as the valve-house was locked. On the same day we went to Gibson Jack and took two measurements. One with a weir, then opened the spill pipe and measured the water passing through that with a box. The first showed .52 second feet and the other .56 second feet. The box measurement was very close, the weir measurement might have fluctuated a little. We measured the water flowing in Cusick Creek by a dam and box holding one cubic foot and found the flow to be .05 of a second foot. We measured the flow in Gibson Jack Creek above the intake of the Pocatello Water Company's pipe line by means of a weir above the dam, the head of the pipe line, and found 1.73 second feet. A box measurement showed 1.95 second feet. Knowing the different elevations, size and conditions of the pipe, one could figure its carrying capacity approximately."

Upon this evidence the judge of the trial court found that the amount of water brought by the defendant from Mink Creek and commingled with the waters of Gibson Jack Creek to be .56 of a second foot (folio 87, page 100, Tr.), and found in addition to that that the total flow of Gibson Jack and Cusick Creeks supplemented by the water brought from Mink Creek, amounted to about 2.56 second feet (folio 88, Tr.). The evidence is undisputed that there was during 1912, irrigated from this water supply, lawns and gardens amounting in all to 103 acres (folio 135, Tr.), and under the terms of Ordinance No. 86, the city of Pocatello is entitled to use 4,000 gallons of water per day for each fire hydrant, which would amount to 224,000 gallons per day for that purpose. During the excessively dry and hot season of the year, the amount of water furnished to the reservoirs would not be much in excess of the necessary amount to irrigate this 103 acres and furnish the 224,000 gallons to the city for fire purposes, street sprinkling, etc., when the fact is taken into consideration that a very considerable amount of this water is lost in the system and does not reach the consumer, as it must be understood in connection with this matter that this 2.5 second feet is the amount delivered at the reservoirs and not the amount delivered to consumers, no allowance is made for waste in the system itself, which the San Francisco expert said in his exerience had run up to as high as 50 per cent, but even assuming that the waste in the system itself does not amount to so much, there would still be a sufficient loss so that we would probably be entirely safe in saying that less than two second feet is actually being delivered to the city of more than 10,000 people for all purposes. The evidence in this case shows that for many

years there has been a shortage in the water supply in the city of Pocatello and the testimony of experts cannot alter the fact that the lawns of citizens have dried up and burned during the hot season, nearly every year for many years, and in addition to that there have been many times when the city has been entirely without fire protection and has not had any water to sprinkle the streets. These matters are very serious, and it seems to us would entirely justify the court in cancelling this franchise irrespective of the terms of the contract. The record in this case shows a long continued abuse of the plaintiff's franchise and the facts constituting this abuse are so clearly set forth in the opinion of the trial court and the transcript that we feel we should not file a voluminous brief setting forth the evidence in detail, as it appears quite clearly in the transcript, which in this case is not lengthy. We desire to quote in our brief and adopt as a part of this argument, some passages from the opinion of the trial court (folios 90, 91 and 92, Tr., pages 103, 104 and 105), as follows:

> "Other factors necessarily entering into the calculation of the sufficiency of the supply are left in equal uncertainty. If the contrary were not here conclusively shown, it would be reasonable to presume the existence of a standard of usual consumption of water per capita approved by experience, at least for ordinary domestic and municipal purposes, and exclusive of use for lawns and gardens, but the published data disclose the most astonishing diversity, and admittedly is no recognized standard. As to the amount required for lawns, gardens and trees, there is apparently no recorded experience at all, and except in so far as such use may be found analogous to the irrigation of agricultural lands the ques-

tion is left almost entirely to conjecture. Definite and credible information is furnished touching the area of lawns and gardens watered from the defendant's system, but the testimony is strikingly conflicting as to the number of people who depend upon it for domestic uses. One fact is put beyond all peradventure: Justly or unjustly, the inhabitants of the city, with remarkable unanimity, entertain the view that during the summer season the water supply is radically deficient. The fact is established by overwhelming evidence, and even two of the three citizens called by defendant for the apparent purpose of establishing a different view, upon cross-examination reluctantly made admissions strongly tending to corroborate the witnesses for the plaintiff. It is abundantly shown that to a degree lawns frequently became parched and trees lose a part of their leaves in the middle of the summer; and that during certain years for a considerable period of time, the water has been entirely shut off from the city for several hours each day. To meet the apparent shortage, when it first began to be serious, the defendant, instead of enlarging the intake and bringing in the waters of Mink Creek as by his contract he was required to do, went to the expense of thoroughly equipping the system with what in the record are referred to as 'reducers,' a device by which the one-half inch opening from the main into the service pipe of each consumer was reduced to one-fourth of an inch, and the two inch goosenecks from which water was delivered into the city sprinkling carts were reduced to about one-half of an inch. Conceding his inability at times to maintain the required pressure for fire protection, and that during the summer season there is a measure of inconvenience and suffering for want of sufficient water, the defendant asserts that the shortage is due to a waste-

ful use, apparently not by all of the citizens, but by a small percentage thereof. There is, however, no substantial evidence of abnormal waste. Some waste there is bound to be where there are so many consumers, even under a meter system, and it may be fairly assumed that where, as here, flat rates are charged, there is a much greater percentage of waste than where meters are used. Where economy in the application of water is unsupported by consideration of self-interest on the part of the consumers, the general tendency is, of course, toward liberality, if not extravagance, of use, and then there are always, in every community, people who, even to the injury of others, will waste when the waste is without cost to them. But the defendant having contracted for the flat rate system must be presumed to have contemplated such extravagance of use as is ordinarily and necessarily incident thereto. He agreed to furnish a sufficient supply of water under a system which he must have known is everywhere and always attended with a use less economical than where the charge is based upon the amount consumed. It must, therefore, be held that he anticipated that the more prodigal use would necessarily prevail, and assented thereto, and he cannot now be heard to say that he has fulfilled his contract obligation because, *while the amount supplied is insufficient under the system with respect to which the obligation was expressly assumed*, it might be sufficient under some other system. I am not to be understood as directly or indirectly sanctioning the wasteful use of water; that is to be deprecated, and, if persisted in, should not only be condemned but appropriately punished. But we must consider conditions as they are, and not as we would like to have them to be. Unfortunately, the flat rate system was contracted for, and neither party can make the

substitution of a better system without the consent of the other, and thus far negotiations to that end have been without result. While admittedly there is substantially no direct evidence of abnormal waste, it is contended that the implications from the testimony of hydraulic engineers called by the defendant are strongly to that effect. Incidentally it may be stated that testimony of a similar character adduced by the plaintiff strongly implies an insufficient supply. But it must be apparent that this so-called expert testimony, both of the plaintiff and the defendant, is of little weight. Admittedly there is no recognized standard of reasonable per capita consumption anywhere or under any conditions. It is also conceded that published experience of the amounts of water actually furnished to and consumed by municipalities fails to approach a reasonable degree of uniformity, and is therefore of little value. Indeed, it is not pretended by the witnesses for the defendant that their opinions upon the per capita amount reasonably required are based upon actual use; and generally speaking, their views seem not to be in harmony with such experience as is disclosed by the reported data. They simply state to us what in their opinion the consumption ought to be. So far as appears none of these witnesses ever made or observed any systematic tests or experiments whatsoever."

It is apparently admitted that there is a shortage of water in Pocatello and an insufficient supply and the excuse seems to be that some of the water users waste water which they would not do under the meter system, but as suggested by the court, if Ordinance No. 86 is to be looked to the flat rate was the one contracted for and the contract contemplated just such a use of water as was usual under the flat rate and not the meter rate,

and in the language of the lower court, defendant "*cannot now be heard to say that he has fulfilled his contract obligation because while the amount is insufficient under the system with respect to which the obligation was expressly assumed, it might be sufficient under some other system.*"

Conduct of Water Company.

As to the conduct of this water company, we desire to again adopt as a part of our argument and quote from the opinion of the trial court (folios 101, 102, and 103., Tr., pp. 116, 117 and 118):

> "As we have already seen, the defendant some years ago reduced the apertures through which the water passes from the mains into the service pipes to a quarter of an inch. Now, consider that under the rules of 1912 the amount of water which, with a free flow, would pass through such a small opening was further cut down for lawn purposes by the requirement that, after suffering the loss of force or current necessarily due to friction in passing through the requisite length of hose, the water should be sprayed through a nozzle not to exceed one-fourth of an inch in diameter. Again, it was required that all sprinkling in the city must be done between the hours of six o'clock and eight thirty o'clock p. m., so that, owing to the limited size of the mains, when the great majority of consumers were using water at the same time, as under such a regulation was bound to be the case, the pressure was materially reduced, thus substantially diminishing the delivery into the service pipes. Add to these restrictions the most noteworthy provisions of the rules, and that which is thought to be especially objectionable.

namely, the requirement that 'the hose through which the water is supplied must be held in the hands of the operator while the sprinkling is being done,' and we have a set of conditions which are thought to be highly unreasonable. I do not mean to say that under no conditions could such a regulation be permissible. Doubtless water can be more effectively applied by holding the hose in the hand than by the employment of any of the many patented sprinkling devices designed for the saving of labor and made familiar to us by their common use, and if all available water were being supplied, and the amount were barely sufficient to meet the needs of all, when applied in the most economical manner, such a stringent rule would doubtless be warranted; but we are not here dealing with emergencies or famine conditions. Or, possibly, if the consumer had the privilege of applying the water at any hour of the day and were furnished with a stream of sufficient volume to enable him to water his lawn expeditiously, the restriction might be tolerated. Here two hours and a half per day are by the rules allowed to the householder for watering his lawn. Presumably for the larger lawns at least all of this time is required, but if we assume that it requires upon the average only an hour and a half each day, an enormous amount of time in the aggregate is necessarily consumed. Now it is obvious that if the citizen could draw three times the volume of water, he could do the required work in one-third of the time, and if the defendant is to be permitted to insist upon the highest possible efficiency for the water he furnished, surely he must furnish it under conditions making its efficient application reasonably practicable; if he would benefit by rigid economy of use he should share in the burdens necessarily incident thereto. According to the testimony

of one of the defendant's employees, water is furnished for approximately eight hundred and fifty lawns, each embracing one or more lots. Assuming that it requires upon the average an hour and a half a day to water a lawn, it follows that each day while these rules are in force the inhabitants of the plaintiff city contribute the equivalent of 1275 hours of time for one man, to the conservation of water, or the whole time of more than 150 men, working continuously for eight hours each day, or estimating such labor to be worth 25 cents an hour, the equivalent of $318.75 per day, or over $18,000.00 for a period of two months, which, upon a basis of six per cent, would cover the annual interest upon an investment of more than $300,000.00. Clearly the necessity for such a waste of time would not exist if the defendant would bring in the available supply of water in Mink Creek, and would in part be obviated if the conduits by which the present supply is brought in and distributed, were of a sufficient capacity to enable consumers more quickly to procure and apply the amounts to which admittedly they are severally entitled."

Failure to Extend Street Mains.

There is much evidence in the record showing that this water company has refused to extend street mains and has compelled the citizens desiring to use its water to construct at their own expense the necessary mains. There is much evidence also showing the flagrant disregard which the manager of this company has had for the rights of the people. Some of the Exhibits in this case are interesting, particularly the letter written to Mayor Cleare (Exhibit 10, Folios 321 to 340). In this

letter defendant said at Folio 338, that the waters of Mink Creek would be brought in, and this was on July 20, 1905. The opinion of the trial court has so thoroughly presented the matters involved that it leaves very little to be said by us in defense of the decree below.

A Reply to Certain Matters in Appellant's Brief.

On page 10 of the brief of appellant is a heading (a), which reads as follows:

> "There is nothing in Ordinance No. 86 which requires Murray to supply water sufficient for the needs of the city and its inhabitants."

May we be permitted to inquire of counsel what they think the city received as a consideration for the passage of Ordinance No. 86? They say the ordinance did not bind them to bring in *the waters of Mink Creek,* and they now say it did not even bind them to furnish a *sufficient supply.* In other words, they seem to argue that the obligations of this contract are all on one side. It is quite apparent that the conditions are extremely burdensome upon the city, but counsel go happily along and agree "quite so" and then quite innocently assert "but we are bound to do nothing at all;" such a condition seems to be directly opposed to the most elementary principles of the law of contracts, one of which is that there must be a consideration for every contract. The recital in the preamble of Ordinance No. 86 referred to in the brief of appellant, is, when taken in connection with Section 6 of Ordinance No. 86, perfectly plain and there does not appear to be any reasonable ground for

quibble about it, either the defendant agreed to bring in the waters of Mink Creek as recited in the preamble or he agreed to nothing at all.

And then counsel say, that at the time Ordinance No. 86 was passed the water supply was *not inadequate*. We reply by saying that whether it was or not, the defendant procured his contract on the assumption and agreement of both parties thereto that the water supply was at that time *inadequate,* and does it now lie in his mouth to make the statement that the statement was untrue and the supply was adequate, and yet say the contract binds the city? The argument of counsel is certainly peculiar, to say the least.

Counsel then say, to have brought in all the waters of Mink Creek would have *doubled* the rates to the consumers. We don't think so. *Ordinance No. 86 fixes* the rates on the assumption and agreement that these waters would be brought in, yet defendant charges us the rates but does not bring in the water and now says if he had brought in the water he would have been compelled to charge more. *What an argument!*

Counsel say, sufficiency of water supply is not an issue in this case. We say directly opposite is true, but whether it is or not the franchise should be cancelled because it has been violated in every particular by the defendant. The record contains abundant evidence that the city for many years has insisted upon a performance of this contract. All that we request is that the entire evidence be read and we insist that it must convince

that the people of Pocatello have been greatly wronged by the defendant and have borne their wrongs with an astonishing amount of forbearance.

Public Utilities Commission.

The suggestion contained in appellant's brief that the city in this case should be referred to the Public Utilities Commission for relief is little short of *absurd.* The utilities commission must take the franchises of this water company as it finds them and to refer the city to that commission bound, and with its hands tied by the unconscionable provisions of a contract which has been violated by the defendant and for which the city has never at any time received any consideration whatever, is to give us a "stone" when we ask for "bread." There is no merit whatever in the suggestion.

Number of Water Users.

The per capita consumption as given by so-called experts is always given by using as a basis the population including every man, woman and child within the city limits. Counsel seem to contend that it should be estimated by counting the water users, but this contention is incorrect. Besides, it is perfectly absurd to say that there are only 5000 people using water from this system when the population of the city is more than 10,000, and this is the only means of domestic supply except a few wells in portions of the town not covered by the present system. Other assignments of error are not argued

or referred to in the brief of appellant, so we do not argue them here.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

D. WORTH CLARK,
J. R. S. BUDGE,
W. H. WITTY,
Attorneys for Plaintiff and Appellee.
Residence, Pocatello, Idaho.